



PLANNING BULLETIN

BULLETIN No. 1-2009

SUBJECT: Zoning

RESOURCE: Commission Land Use Planning

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Concerning Requests for Zoning Relief for Residential Use by Variance in Agricultural Zoning Districts

Recent zoning cases, in which petitioners have sought zoning variances that work to split parcels in Agricultural zoning districts so as to create new parcels for residential use, have led to some confusion about how such petitions are reviewed and the factors that should be considered in determining recommendations for relief. Because of this, Planning Commission staff – who are required to provide a professional staff opinion concerning these cases – reviewed planning policy and practice and offer the opinion below as a guide for future zoning case analysis and consideration.

Zoning as Regulation of Use

Zoning generally provides for regulation of two things: the **purposes** for which property will be allowed to be **used**, for example agricultural, residential or industrial uses; and **aspects of the structures** associated with the use (for example the bulk, size, and location of structures) as might be necessary for public health and safety. We find that the purpose of zoning as a regulation of *use* is particularly relevant to the situation discussed in this *Bulletin* as zoning is seen as “a general plan to control and direct the use and development of property in a municipality by dividing it into districts according to present and potential use of property” [Devaney v. New Haven Bd. of Zoning Appeals, 132 Conn. 537, 45 A.2d 828 (1946)]. We take particular note of its addressing “present and potential” use.

The immediate problem addressed in this analysis relates to uses in County districts zoned Agricultural as this zoning also allows for residential use by right. This allowance appears to lie at the heart of the question. We believe that the intent of this allowance was for residential homesteads associated with the Agricultural use, not as a means to simply create new parcels intended solely for residential use unassociated from an agricultural use. These unassociated uses we believe are more appropriately Residential district uses.

The petitions brought to date represent two different types of cases: cases in which the subject property has never been in residential use, representing a “potential” use; and cases in which the subject property is currently in residential use or was in the recent past, representing a “present” use.

Cases in Which the Subject Parcel Becomes Residential But There Is No Previous Residential Use

The first case is one in which the petitioner seeks to subdivide a parcel zoned Agricultural, intending to create a new parcel for a residential use where there was no previous residential use. In this case we believe that the appropriate petition would not be for a variance, but instead for a reclassification of zoning to the appropriate Residential classification.

This opinion is based first upon the previous consideration of the nature of zoning as a regulation of *use*. If the facts are that the petition is for residential use or the proposed configuration of the property indicates a residential use, then it is clear that the intended use is not Agricultural but Residential. The continuation of an underlying Agricultural zoning in our opinion would not be appropriate in these cases and the petitioner should seek relief through a re-zoning to Residential instead of a variance that would keep the Agricultural zoning in place.

Second, we believe that such an approach would represent good planning practice. If a re-zoning, rather than a variance, were sought, it would trigger a LESA review to allow the determination as to whether or not the property was appropriate for a non-agricultural use. This would be an improvement over a situation in which only a variance is sought, because in that case no LESA review is required so the results of that scoring are not available as evidence in the case. Because LESA scores the entire property, not just the parcel being split off, the residential portion may not meet the required LESA score. We note, however, that should Commission staff find that the subject parcel would not be reasonably useable for agricultural purposes, it may find that the rezoning requested is appropriate and recommend that zoning relief be granted despite the LESA score.

In this type of case, when: (1) Commission staff is presented with a zoning petition requesting a variance allowing the separation of a parcel that is currently zoned Agricultural; and (2) where the facts of the case at the time of review indicate that the subject parcel will be used solely for residential use not associated with any agricultural purposes; and (3) the subject parcel was not previously used for residential purposes, the professional staff recommendation would be to deny the variance as the appropriate request should be a reclassification to the appropriate residential zoning.

We believe that such an approach to these cases is beneficial to the public because it:

- Is consistent with the new, intended use of the property;
- Would require a review under LESA;
- Provides for better overall planning of land use;
- Better addresses petitions that seek variances for multiple new lots without setting a multiple lot condition.

Cases in Which the Subject Parcel Becomes Residential But There Was a Previous Residential Use

This leads us to the second case. In these cases the petitioner is requesting a variance to split off a subject parcel that has a residence on it or that had one in the recent past. Many times this request is related to the desire to separate a farm homestead from a larger agricultural property for mortgage purposes. We believe that these cases represent a different situation than the cases discussed above, and in coming to this conclusion draw guidance from legal “nonconforming uses”. While the situation addressed here is *not* a legal nonconforming use, we believe that it is useful to consider them by way of explanation.

A legal nonconforming use is a use “which lawfully existed prior to the enactment of a zoning ordinance and which is maintained after the effective date of the ordinance, although it does not comply with the use restrictions applicable to the area in which it is located.”¹ Since the use was pre-existing and legal, allowing a nonconforming use to continue does not deprive the property owner of the use and maintenance for which it was previously devoted.

Following this same logic, it is our opinion that it is appropriate for a variance to be requested to divide a property where there is evidence of a pre-existing residential use. The petitioner would still need to provide evidence that the three “findings of fact” called for in the County ordinance are met for zoning relief to be considered. Those findings are:

- (1) That the property in question cannot be economically used or yield a reasonable return, if permitted to be used only for the conditions allowed by the regulations.
- (2) That the plight of the owner is due to circumstance unique to the property and not generally applicable to other property in the area.
- (3) That the variation, if granted, will not alter the essential character of the locality, impair an adequate supply of light and air to adjacent property, increase the congestion of traffic, or diminish or impair property values in the locality.

While the third finding will largely be determined by the situation, we believe that if there is a pre-existing residential use this would provide some evidence on its face that the first two findings of fact can be met. For example, if a pre-existing residential use is presented, this would provide some reasonable evidence that it would not be economically feasible to return the property to farmland (the underlying Agricultural zoning). Maintaining the residential use would be reasonable. Also, the property would be unique compared to surrounding properties with Agricultural zoning as the property already is in residential use. Again, it would not be reasonable to require the property owner to return the property to farmland.

In this type of case, when: (1) Commission staff is presented with a zoning petition requesting a variance allowing the separation of a parcel that is currently zoned Agricultural; and (2) where the facts of the case at the time of review indicate that the subject parcel will be used solely for residential not associated with any agricultural purposes; and (3) the subject parcel is demonstrated to have a pre-existing residential use, the professional staff recommendation might be to allow the variance if the evidence shows that the three standards of variation are met.

¹ Cope, R. (2005). Zoning Handbook for Municipal Officials. Springfield, IL: Illinois Municipal League. P. 121.